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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of ANNA MATHAI and ROBERT LEE MAYBERRY.	
ANNA MATHAI, Appellant, v. ROBERT LEE MAYBERRY, Respondent.	A140848 (Alameda County Super. Ct. No. RF10553375)

Robert Lee Mayberry (husband) appeals from a judgment of dissolution and order allocating the division of the community assets. Husband contends that the court erred in ordering a division and sale of the marital home prior to concluding its characterization and division of the parties' assets and liabilities. We affirm.

I. FACTUAL BACKGROUND

Husband and Anna Mathai (wife) were married on March 4, 2005. Prior to their marriage, they purchased a home at 6353 Fairlane Drive in Oakland (the Fairlane property) with each spouse contributing to the down payment. The parties separated in December 2010, after five years of marriage. Wife filed this dissolution action on December 28, 2010.

On June 6, 2011, the parties stipulated to appoint Jeff Stegner, a certified public accountant, to complete a tracing to determine the separate and community property

interests in the Fairlane property as well as certain other assets. The parties also stipulated to transfer the Fairlane property to husband as his sole and separate property subject to the court retaining jurisdiction to determine wife's interest in the property, if any. Stegner was to file his report with the court by August 26, 2011. The parties, however, were not satisfied with Stegner's progress and found his rates to be too expensive. They decided not to use his services. Stegner consequently did not file a report with the court. The matter was scheduled for trial on the property disposition issues, but was continued several times and finally commenced on May 28, 2013.

The parties represented themselves at trial. The evidence showed that the parties purchased the Fairlane property in March 2003 and took title as joint tenants. Wife testified that she contributed $122,650.24 to the down payment for the house. Husband testified that he thought he contributed two-thirds of the down payment while wife contributed one-third.[1] On cross-examination, he conceded that the parties contributed equally to the down payment. The property was secured by a deed of trust in the amount of $937,500. There was also a second deed of trust on the property in the amount of $125,000. The property was refinanced in 2010 after the parties were married.[2] It was appraised on May 6, 2011 at $1,150,000, but due to some property damage,[3] the appraised value as of May 17, 2013 had decreased to $900,000. The current principal balance on the mortgage as of February 25, 2011 was $686,403.82.

[1] Husband also testified that he paid two thirds of the expenses on the property until wife filed for divorce.

[2] Husband testified that he told wife in 2009 that he was going to use his separate assets to pay down the first mortgage on the property in order to obtain a lower interest rate on the mortgage. He claimed that he used separate property or a settlement from IBM, his former employer, to pay down the mortgage. Evidence on this issue, however was lacking.

[3] The property apparently suffered some damage from heavy rainstorms.

In April 2011, wife began making $1,500 monthly payments toward expenses for the Fairlane property. She ceased making payments in May or June due to the stipulation transferring the property to husband.

The court appointed Joan Weatherell as the court's expert under Evidence Code section 730 to determine the parties' community property interest in any pension plans, retirement plans, deferred compensation accounts, or other bank accounts that the parties acquired during the course of their marriage.

On December 4, 2013, the court issued a statement of decision awarding husband spousal support in the sum of $2,200 per month for a period of six months. The court found that the Fairlane property was community property and that the parties were entitled to an equal interest in the property. The court set the current value of the property as $900,000, accounting for the cost of repairs. The court ordered that the property be sold forthwith and that the net proceeds be divided equally between the parties. The court also ordered that husband would have the option to purchase wife's interest in the Fairlane property until February 5, 2014. Further, the court noted that the parties' deferred compensation plans and bank accounts would be divided as determined by Weatherell.

On January 10, 2014, the court entered a judgment of dissolution of the parties' marriage, incorporating the terms of its statement of decision. This appeal followed.

II. DISCUSSION

Husband argues that the trial court prematurely decided the issue of the characterization of the Fairlane property because it did not await a report by Stegner, who had been appointed to trace the parties' interests in the property. Although the parties initially hired Stegner to perform a tracing, they became dissatisfied with his work and decided against using his services. Stegner never completed a report. Husband's claim now that he did not present evidence at the trial on the issues of his contributions to the property because he believed the issue was not going to be determined until Stegner completed his report is disingenuous. Indeed, the parties briefed the issue of the

valuation of the Fairlane property in their trial briefs and husband argued that the property should be awarded to him.

Husband faults the court for proceeding with the issue of determining the parties' interests in the property without giving him sufficient notice. He, however, knew or should have known that the issue was before the court for determination. Wife twice stated it was one of the issues to be tried, and husband did not object.

Husband quotes portions of the record out of context to create the impression that he had conveyed to the judge his understanding that the characterization and division of the Fairlane property would be the subject of some future proceeding. Husband also argues that the order appointing Stegner to conduct the tracing of payments for the house was never "rescinded or set aside," and therefore husband anticipated Stegner's work would be completed before the court made a decision on the characterization of the property. The record belies these contentions.

At the outset of the trial, husband informed the court that Stegner was effectively fired by the parties because they felt his fees were too high. Later that same day, wife sought to introduce a document purporting to show that a particular account was her separate property. Husband objected, stating that "this particular account and other accounts [were] to be reviewed by Moon & Schwartz . . . ." This caused the court to seek to clarify what had occurred with regard to the appointment of experts. The court then located the order appointing Stegner to "complete a tracing to determine the separate property character and the [Family Code[4] section] 2640 claims of [husband] in . . . the former family residence located at 6353 Fairlane Drive" and to determine the separate and community interests in the parties' various retirement accounts. The court then made the following statement: "[I]f Stegner never completed his work, and we have Moon, Schwartz & Madden coming into the fray, of which I don't know if they've done all of this analysis or not, I'll wait to see—because I can tell you, I'm not going to sit there and

[4] Unless otherwise indicated, all future statutory references are to the Family Code.

go through tons and tons of accountings to do those types of things." To which wife responded, "we did each both pay Jeff Stegner to do this. It was just turning out to be very expensive and unsatisfactory. So subsequently, we—and I believe this was with [husband's former counsel]—we decided to go our own way and we would provide our own tracing."[5] The court reiterated, "I'm just letting you all know, I'm not going to be the one going through and doing the tracing for you, just so you all know." The record thus reflects that although Mr. Stegner had been tasked to complete a tracing on the property, that task had not been—and was not expected to be—completed because the parties did not want to continue paying his fees.[6]

With regard to husband's asserted belief that the judge left the impression that the characterization of the house was not going to be adjudicated in that trial, the record plainly shows otherwise. For example, when husband was cross-examining wife the court became frustrated with the parties' lack of focus on the issues at hand. The court explained, "You know what, this is not helpful to me. . . . [¶] . . . [¶] Most of what I'm hearing is irrelevant; it's not helpful to me in making a decision. . . . [¶] . . . [¶] What am I going to do with the house? How do I value the house? How do you prove to me, either of you—which neither of you have—of who put what money into this account, into this house? . . . [¶] . . . [¶] If you, Mr. Mayberry, when you present your case, show me that you paid the bills on the house that you lived in, and that somehow that means you should get some reimbursement under the law, that's your testimony. [¶] She's already

[5] After wife made this statement, husband interjected, "I'm sorry. You can't say 'we.' " It is not clear what husband meant by this. What is clear, however, is that husband also told the judge the parties decided not to use Stegner because his fees were too high.

[6] On the last day of trial, there was another brief mention of Stegner. The court made it clear that its decisions "are based on the evidence produced at trial. And I don't think I got anything, technically from Mr. Stegner during the trial." Husband then said, "I tried to submit it" and the court responded "I'll go back and look at that." Husband does not contend, however, that he offered anything prepared by Stegner into evidence or that the court erroneously rejected any such evidence.

told me in testimony that she basically didn't pay much on th[e] houses after she left. Now, the question is whether should she have. She didn't have a legal responsibility at that point, with you living in the house, unless—*unless*—the payments that you had to make on those were beyond the reasonable rental value. I have no evidence of reasonable rental value yet in this case. . . . [¶] There [are the] legal issues that you are both missing. I can't do them for you. You're under—just like anybody else, it's your responsibility to prove your case." After a further colloquy the court again explained: "I'm trying to figure out—it may be a reimbursement issue. If you [husband] made all the mortgage payments and taxes and insurance on Fairlane after separation, you may very well have an issue there for reimbursement. But you need to focus on telling me what you paid and what period of time you paid it. And then there's the legal issue of whether you should have paid it because you lived in the house, or whether you were paying too much or too little. That's all relevant." Shortly thereafter the court explained *again* what it needed to make its decision on the house. Husband then stated "I respect that quite a bit, Your Honor," and then indicated he would need to take a break because the discussion had "offset [his] strategy" for the morning. He stated further that he thought most of it would "unfold" when wife cross-examines him. He did *not* say anything about the issue being deferred to another proceeding.

Again, at the close of the hearing, the court gave the parties extensive and explicit direction about the issues they needed to cover regarding the Fairlane property when they presented argument on the matter, including whether there was any right of reimbursement for separate property down payments, whether a new deed incident to a refinance had any impact on the parties' equity, what dates and calculations should be used for valuation of the community interest, and what payments by husband for the house ("mortgage, taxes, insurance") have been made that constitute a reimbursement claim, and whether there were exceptions under *Epstein*.[7] Husband then mentioned the paydown on the home using the IBM settlement, and the resulting *community debt* for the

[7] *In re Marriage of Epstein* (1979) 24 Cal.3d 76.

tax liability arising from the settlement. The court agreed this was an issue, stating, "[t]he IBM settlement if there is an issue there, whether it's community or separate or hybrid, or if there is tax debt related to it, *those are all things you need to argue to me*."

At closing argument, wife argued the Fairlane home was community property; that husband paid $92,000 and wife paid $122,650.24 toward the down payment, which should be reimbursed to each party; and that the "whole property should be treated as community property" because husband "presented no evidence of separate property contributions towards mortgage pay-downs. The burden is on the spouse asserting its separate character to overcome the presumption . . . ." Wife pointed to the appraisal valuing the house at $900,000 and estimated the current mortgage balance at $665,000. Wife requested that the court order a sale of the house due to "[husband's] diminished assets since the date of separation and his current expenses."

Husband requested that the court award the Fairlane property to him because "[t]here is no equity in the property," given the estimates of what it would cost to repair damage on the property. Husband offered *no argument* on the characterization of the property, or on the reimbursement issues, or on the paydown of the mortgage.

On this record, it cannot be credibly argued that husband was misled into believing that the characterization of the Fairlane property and the issue of reimbursements were not going to be decided at the trial.

Husband also argues that the court erred in ordering the "*pendente lite*" sale of the Fairlane property. He describes the judgment entered after the trial on the division of property as an "interlocutory judgment" and contends that the court could not properly carry out the mandate of section 2550 until all of the parties' assets and debts were characterized and valued. For this proposition, husband cites *Lee v. Superior Court* (*Lee*) (1976) 63 Cal.App.3d 705, 711. *Lee* is inapposite. There, the court, without determining whether a building was community or separate property, ordered it sold *and* ordered the proceeds to be used to pay the debts of a business operated by husband and claimed to be his separate property. This was done based on the court's finding that the sale of the building was " 'necessary to preserve another alleged community asset,' [husband's]

business, that other means of financing the business were not available . . . , and that the business needed between $30,000 and $50,000 'immediately . . . .' " (*Lee*, *supra*, 63 Cal.App.3d at p. 709.)

In any event, the judgment entered here after the trial on the division of assets was a final judgment, leaving only the characterization of the IBM settlement and related tax liability to be determined at a later time. The plain language of section 2550 permits the court to reserve jurisdiction to make a property division after entry of judgment.[8] And, as husband acknowledges, section 2108 specifically authorizes the court to order an asset sold *pendente lite*: "At any time during the proceeding, the court has the authority, on application of a party and for good cause, to order the liquidation of community or quasi-community assets so as to avoid unreasonable market or investment risks, given the relative nature, scope, and extent of the community estate. However, in no event shall the court grant the application unless, as provided in this chapter, the appropriate declaration of disclosure has been served by the moving party."

Husband does not contend the appropriate declarations of disclosure were missing. He argues rather, that the sale was neither requested nor ordered with specific reference to section 2108, and was not necessary to "avoid unreasonable market or investment risks" because wife had deeded the house to the husband during the divorce proceedings and was fully protected from any future events that might affect the value of the property. Husband also argues that section 2108, *by its terms*, requires the court, before ordering the sale of an asset, either to ensure there are other community assets to offset any payment made to one of the spouses or to require some sort of security to protect both parties' interests. Again, husband cites to *Lee*.

[8] Section 2550 provides that "in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall, either in its judgment of dissolution of the marriage, in its judgment of legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally." (See *In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 625, 631–632 [court has broad discretion to fix the date of valuation and to determine the manner in which community property is to be divided to effect an equal division].)

To begin with, we know of no authority that requires the specific mention of section 2108 when a party is requesting, or a court is ordering, that an asset be sold in order to protect against market risks. Here, in closing argument, wife argued that the house should be sold forthwith due to "[husband's] diminished assets since the date of separation and his current expenses." In essence, she contended that husband had been resisting her prior requests that the house be sold, and she was concerned that if it was not, all of her share of the equity in the home would be lost due to husband's inability to maintain it. The court ordered the sale as requested. Based on the record as a whole, it is clear that husband was having serious financial difficulties, which is why he requested spousal support from wife. This is sufficient to affirm the court's order, whether or not the court specifically referred to section 2108.

Second, contrary to husband's contention, the trial court's prior ruling—that husband would take title to the house subject to wife's community property interest—did not "insulate [wife] from any subsequent event that might have affected the value of the house" because it did not protect her share of the equity in the house should it be foreclosed upon or subject to a forced sale. Given husband's financial condition, the court could readily conclude that there would be few, if any, assets to pay wife her share of the equity in the event the house was lost.

Third, nothing in section 2108 *itself* requires the court either to ensure there are other community assets to offset the interim payment of equity to one spouse or to provide for security to protect the interests of the parties. For this proposition, husband again cites to *Lee*. But as we have explained, *Lee* involved the sale of a presumably community asset and the payment of 100% of the proceeds to one party. (*Lee*, *supra*, 63 Cal.App.3d at p. 709.) Here, the court ordered a community asset sold and the proceeds divided evenly, in accordance with section 2550. If, as husband posits, a later determination relating to the IBM settlement and its concomitant tax liability results in monies owed from wife to husband, nothing in the record suggests that wife would be unable to pay it. Additionally, if husband was concerned that he ultimately would not receive his full share of the community property, after all assets and debts were

characterized, valued, and divided, he could have sought other remedies. (See, e.g. § 2045 [protective order restraining party from disposing of proceeds of sale of the property; Code of Civ. Proc., § 917.4 [undertaking to stay enforcement of judgment directing the sale of real property to prevent waste].) In the end, the only questions before us are whether the court had the authority to order the house sold before other community assets and debts were characterized in order to protect the parties' equity in the home, and whether the court abused its discretion in doing so. On the record before us, there was no abuse of discretion.

III. DISPOSITION

The judgment is affirmed. Wife is to recover her costs on appeal.

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Rivera, J.

We concur:

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Ruvolo, P.J.

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Streeter, J.